



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.09.2020

CORAM:

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THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

C.R.P (MD)No.287 of 2014

1.M.Sajini
2.Nelson Babu

... Petitioners / Respondents
1 & 2/Plaintiffs

Vs.

1.Vijayakumar

rep. Through his Power Holder,
Shylaja

... 1st respondent/1st Defendant

2.Stella

... 2nd respondent/2nd Defendant

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair order and decretal order dated 23.10.2013 made in C.M.A.No.7 of 2013 on the file of the Principal Subordinate Judge, Nagercoil and reversing the fair order and decretal order dated 05.02.2013 made in I.A.No.594 of 2011 in O.S.No.619 of 2001 on the file of the Principal District Munsif Court, Nagercoil.

For Petitioner : Mr.Mohammed Ibrahim Saibu
for M/s. Ajmal Associates

For Respondents : Mr.N.Dilip Kumar for R-1
No appearance for R-2

ORDER

This Civil Revision Petition has been filed by the respondents/plaintiffs against the order passed by the Principal Subordinate Judge, Nagercoil in C.M.A.No.7 of 2013, dated 23.10.2013.

2.The petitioners herein have filed a suit in O.S.No.619/2001 on the file of the Principal District Munsif, Nagercoil for the relief of permanent injunction restraining the first respondent from interfering with their possession and enjoyment of the suit property. The learned Principal District Munsif passed an exparte decree on 20.07.2010. The respondents herein have filed an application in I.A.No.594 of 2011 to set aside the exparte decree. The learned Principal District Munsif, by the order dated



05.02.2013, has dismissed the said application with costs. Aggrieved by the same, the first respondent has filed an appeal in C.M.A.No.7 of 2013 on the file of the Principal Sub Judge, Nagercoil. The learned Principal Sub Judge, Nagercoil, by the order dated 23.10.2013, has allowed the said appeal and set aside the order passed by the Principal District Munsif, Nagercoil in I.A.No.594 of 2011 and allowed the said application. Feeling aggrieved, the plaintiffs have filed the present civil revision petition.

3.Heard Mr.Mohammed Ibrahim Saibu for M/s. Ajmal Associates, the learned counsel for the petitioners and Mr.N.Dilip Kumar, learned counsel for the first respondent.

4.The learned counsel for the petitioners has submitted that through out the proceedings, the first respondent has participated and he filed a written statement and also at the time of examining the P.W.1 in chief also, he participated, but when the matter was posted for cross-examination, he did not come forward to cross-examine the witness, even though several adjournments were given and taking into consideration of the said facts, the trial court has rightly held that the said decree was passed on merits and as such, the petition which has been filed under Order 9 Rule 13 of C.P.C is not maintainable and accordingly, he rightly dismissed the said petition. He further submitted that the Appellate Court, without considering the fact that the first respondent has participated in the proceedings and wantonly did not come forward to cross-examine the P.W.1, erroneously set aside the order of the trial court and allowed the appeal and hence, he prayed to allow this civil revision petition and set aside the order passed by the learned Principal District Judge in C.M.A.No.7 of 2013.

5.Per contra, the learned counsel for the first respondent has submitted that admittedly, only one witness was examined in chief on the side of the plaintiffs and the said witness was not cross-examined and taking into consideration of the same, the learned Principal District Munsif has set the defendants exparte and passed an exparte decree. But, when the first defendant/first respondent has filed a petition to set aside the exparte decree, the learned Principal District Munsif strangely took a decision that the said decree has been passed on merits and hence, the petition under Order 9 Rule 13 of CPC is not maintainable. He further submitted that as per the explanation attached to Rule 2 Order 17 of CPC, where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned the Court may, in its discretion, proceed with the case as if such party were present. But, in this case, on the side of the defendants, no evidence was adduced and in such a case, the decree, which was passed, has to be treated only as exparte decree and therefore, the petition under Order 9 Rule 13 of CPC is maintainable. But the



trial court has erroneously dismissed the said petition. He further submitted that the appellate court, taking into consideration of the aforesaid facts, rightly allowed the appeal and set aside the order passed by the trial court and allowed the I.A.No.594 of 2011 and therefore, he prayed to dismiss the civil revision petition.

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6.He further submitted that in pursuance of the said order, the suit was restored to file and subsequently, as per the orders passed by this Court in Tr.C.M.P.(MD).Nos.69, 70 and 71 of 2015, the aforesaid suit and other connected suits were transferred to the file of the learned Principal District Judge, Nagercoil and all the suits were taken up for joint trial and the said suits are now at part-heard stage and at this stage, if the present civil revision petition is allowed that would cause much prejudice to the parties and therefore, he prayed to dismiss the civil revision petition.

7.The learned counsel for the first respondent, in support of his contention relied upon a decision in **B.Janakiramaiah Chetty V. A.K.Parthasarathi and others**, reported in 2003 (5) SCC 641 .

8.This Court has carefully considered the submissions on either side and also the materials filed along with civil revision petition.

9.Admittedly, only one witness was examined on the side of the plaintiff as PW.1 and when the case was posted for cross-examination, the defendants remained exparte and the trial court also passed an exparte decree. But, when the first defendant/first respondent has filed a petition under Order 9 Rule 13 of CPC to set aside the exparte decree, the learned District Munsif has strangely dismissed the said petition as the decree was passed on merits and hence, the said petition is not maintainable.

10.In **B.Janakiramaiah Chetty V. A.K.Parthasarathi and others**, (cited supra), the Hon'ble Supreme Court has held that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present. In this case, no evidence was adduced on the side of the defendants and hence, the said decree was only an exparte decree. The learned District Munsif has misconstrued the provision of order 17, Rule 3 of C.P.C while dismissing the petition, which was filed under Order 9 Rule 13 C.P.C, as if the judgment was passed on merits. Hence, the appellate court has rightly interfered with the said findings and set aside the order passed by the trial court. This Court does not find any infirmity in the order passed by the appellate court. Hence, this civil revision petition is liable to be dismissed.



11. In the result, this civil revision petition is dismissed.
No costs.

Sd/-

Assistant Registrar (Records)

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// True Copy //

/ /2020

Sub Assistant Registrar(CS)

VS

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.

To

1. The Principal District Judge,
Kanyakumari at Nagercoil.

2. The Principal Subordinate Judge,
Nagercoil

3. The Principal District Munsif Court,
Nagercoil.

+1 CC to Mr.N. DILIPKUMAR, Advocate (SR-16749[F] dated 14/09/2020)

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VB (03.11.2020) 4P 5C